U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-05937

ORDER DENYING CONFIRMATION

The relief set forth on the following pages, for a total of 13 pages including this page, is hereby ORDERED.

FILED BY THE COURT
04/10/2008

US Bankruptcy Court Judge
District of South Carolina

Entered: 04/11/2008

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE: Eugene Robert Walter and Margaret Came Walter, Debtor(s).	C/A No. 07-05937-DD Chapter 13
IN RE: Terry Russell Keys and Susan Rembert Keys, Debtor(s).	C/A No. 08-00073-DD Chapter 13 **ORDER**

THIS MATTER is before the Court on issues that increasingly arise in this District in Chapter 13 cases, including the two captioned above. The Debtors in these cases have added language to the District's form plan[1] relating to debt secured by their principal residences, drawing objections from the Chapter 13 trustee ("Trustee") and the mortgage creditors.

A hearing was held in 08-00073 on March 17, 2008. Debtor and Ocwen Loan Servicing, LLC, by and through counsel, and Trustee appeared at the hearing. A hearing was held in 07-05937 on February 20, 2008. Debtor, Trustee, the first mortgage holder, Midland Mortgage, and the second mortgage holder, South Carolina Bank & Trust , appeared by and through counsel.

There are no facts in dispute. The issues are purely legal in nature. The dispute revolves around the addition of five provisions that the Walters and the Keys (hereafter collectively "Debtors") seek to include in their plans as follows:

> *If the plan provides for payment of arrearages only with regular payments to be made outside the plan directly by the debtor(s), confirmation of the plan shall impose a duty on the holder(s) and/or servicer(s) of such claims:*

[1] See SC LBR 3015-1(a) and Exhibit A to SC LBR 3015-1

a) to apply the payments received from the trustee only to arrearages provided for under the plan; and

b) to apply all post-petition payments made by the debtor(s) to the period in which those payments are due pursuant to the plan, whether such payments are immediately posted to the loan or are posted to some type of suspense account.

c) to treat the loan account of the debtor(s) as contractually current as of the petition filing date, thereby precluding the imposition of late payment fees or other default-related fees and charges based solely on any pre-petition default

d) if the loan account is an adjustable rate mortgage, to notify the debtor(s) and the attorney for the debtor(s) of any interest rate change and the effective date of that change

e) if the loan account includes an escrow account, to notify the debtor(s) and the attorney for the debtor(s) of any escrow amount change, the reason for the escrow amount change, and the effective date of that change.

Walter proposed chapter 13 plan filed January 3, 2008.[2]

The Court first notes that the plan provisions are preceded by the language "If the plan provides for payment…." The provisions should not be included in plans unless applicable to the debtor's situation. The form plan needs no additional boilerplate language. Additionally, provisions like subsection d) should be included, if at all, only where they apply. Case No. 07-5937 involves an adjustable rate mortgage while 08-00073 does not.

Debtors argue that the inclusion of these plan provisions is necessary to combat an ongoing problem that has plagued chapter 13 debtors for many years. The purpose is to ensure that, after a debtor has successfully completed the plan, the debtor is current on his or her residential mortgage. There have been instances (no specific examples in this District were brought to the attention of the Court) where, after completion of the plan

[2] The plan filed in 08-00073 includes identical provisions. These provisions are modeled after but condensed versions of provisions discussed in *In re Collins*, 2007 Bankr. LEXIS 2487, 2007 WL 2116416(Bankr. E.D. Tenn. 2007).

and closing of the case, the debtor is notified of late charges and/or other fees. In the worst case scenario a debtor's mortgagee initiates foreclosure proceedings immediately after the completion of the chapter 13 case. Debtors argue that 11 U.S.C. § 524(i)[3] and § 1322(b)(11) form the basis for the proposed provisions. The creditors argue that these provisions either alter the note and mortgage between the parties in violation of § 1322(b)(2), (3), and (5) or are unnecessary. Section 1322 states, in relevant part,

> (b) Subject to subsections (a) and (c) of this section, the plan may--
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
>
> (3) provide for the curing or waiving of any default;
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due; and
>
> (11) include any other appropriate provision not inconsistent with this title.
>
> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--
>
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
>
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322.

Section 524(i) states,

[3] Further references to the Bankruptcy Code shall be by section number only.

> (i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

11 U.S.C. § 524.

When construing a statute, the Supreme Court instructs us to "look first to the language." *Richardson v. United States*, 526 U.S. 813, 818 (1999). A basic principle of statutory construction is to "account for a statute's full text." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Here, the Bankruptcy Code allows for the modification of the rights of secured creditors with the noted exception of those creditors secured by a lien on a debtor's principal residence. The Code then provides that a Chapter 13 plan may provide for the curing of default and maintenance of payments on a secured claim, even one secured only by the debtor's principal residence. In specifically providing for the curing of default and maintenance of payments on claims secured by a principal residence, we are guided in construction by the maxim *expressio unius est exclusio alterius*. With the statutory framework in mind, we turn to the provisions.

I. Confirmation of the plan shall impose a duty on the holder(s) and/or servicer(s) of such claims to apply the payments received from the trustee only to arrearages provided for under the plan.

Creditors argue that this provision is unnecessary because it merely states what parties understand to be the "law" of this District.[4] This may be so, but, as Debtors point out, the cause of action created by § 524(i) is not self-executing. Under § 524(i) a creditor's failure "to credit payments received under a plan confirmed under this title…

[4] Chapter 13 plans in this District generally provide, as to home loans, that pre-petition arrearages will be cured over time by application of payments from the trustee under the plan with current payments made directly by debtor to the mortgagee.

shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor."

In other words, in order for a cause of action to exist, the creditor must apply plan payments in derogation of the plan. If the plan does not set forth the way in which creditors are to apply payments, § 524(i) may be unavailable to debtors. The provision is specifically within the contemplation of § 1322(b)(3), (5). This provision does not appear to be otherwise inconsistent with Title 11, and thus, is within the scope of § 1322(b)(11). The Court sees no reason to bar it from inclusion in the plan, especially given the fact that it may be necessary if debtors are to avail themselves of the protection of § 524(i).

II. Confirmation of the plan shall impose a duty on the holder(s) and/or servicer(s) of such claims to apply all post-petition payments made by the debtor(s) to the period in which those payments are due pursuant to the plan, whether such payments are immediately posted to the loan or are posted to some type of suspense account.

The meaning of this provision is less than clear. It appears to require creditors to apply post-petition payments made outside the plan by the debtor to the "period" (the Court reads this as ordinarily meaning "month") that the payment is due pursuant to the plan. In this District post-petition payments are ordinarily made outside the plan directly by debtor. They are paid according to the terms of the debtor's note and mortgage. The form plan alludes to this in two separate places.

First, section 4(a) of the form plan states, "Regular payments will be made directly by the debtor(s), beginning _____." Second, section 8 states, "[t]he terms of the debtor(s') pre-petition agreement with a secured creditor shall continue to apply except as provided for in this plan, the Order confirming the plan or other Order of the Court." It seems, when considering these provisions together, that the language "due pursuant to the plan" contained in the provision under review does nothing more than

require the debtor's post-petition payments to be made in accordance with the original note and mortgage, at least under the practice followed in this jurisdiction. If that is the intent of this provision then it is unobjectionable. The overall effect of this language would simply give a debtor an avenue to pursue § 524(i) claims in the event a creditor failed to properly credit payments according to the original note and mortgage.

On the other hand, and more likely the Debtors' intention[5], if this provision requires a specific payment to be applied to a specific payment period rather than as provided by the note and mortgage, then the provision violates § 1322(b). For example, consider that a debtor makes the January payment late, and creditor assesses a late charge pursuant to the terms of the note and mortgage. When the debtor makes the February payment, in a timely manner, it would be applied, pursuant to the terms of the note and mortgage, first to the previous month's late charge and then to interest and principal. If this provision requires creditors to apply the February payment only to the February principal and interest, and prohibits creditors from recovering otherwise allowable late charges because the payment is not applied to the February payment "period," then this provision alters the parties' note and mortgage in violation of § 1322(b)(2). Since the meaning and intent of this provision is unclear and since the burden at confirmation is on the debtor, the provision cannot be included in the plan if it is to be confirmed.

III. *Confirmation of the plan shall impose a duty on the holder(s) and/or servicer(s) of such claims to treat the loan account of the debtor(s) as contractually current as of the petition filing date, thereby precluding the imposition of late payment fees or other default-related fees and charges based solely on any pre-petition default.*

At first blush, the provision seems to do nothing more than restate the effect § 1322. Section 1322 prohibits alteration of notes and mortgages secured only by a debtor's principal residence, with one exception. Sections 1322(b)(2), (3),(5), and (c)(1)

[5] A debtor might facilitate learning of a post-confirmation default or charge by indicating a waiver of any automatic stay violation due to the creditor's providing periodic payment statements and by proposing a plan provision that requires that post-petition fees and charges be shown as a line item in the statement.

allow a debtor to "cure" pre-petition arrearages. The effect of these sections is to split a mortgage creditor's loan into two separate claims, a pre-petition amount including arrearages, late charges, and other fees assessed in accordance with the note and mortgage (and represented by an allowed proof of claim for the pre-petition deficiency), and a post-petition claim which represents current, ongoing payments due after the petition date. In other words, as of the "petition filing date" § 1322 treats the loan as "contractually current," at least where the debtor complies with the plan. *See In re Seal*, 2007 WL 710135, 2007 Bankr. Lexis 706 (Bankr. D. Kan., March 6, 2007)(slip op. 3).

The pre-petition arrearage is paid by the trustee from plan payments and the post-petition payments are made by debtor outside the plan - as if the loan were not in default. If the Debtor makes all plan payments and makes timely direct post-petition regular monthly mortgage payments, at the end of debtor's Chapter 13 case the debtor will be current.

The Court notes two concerns expressed by Debtors for which this provision is created. The first is illustrated by *Nosek v. Ameriquest Mortg. Co. (In re Nosek)*, 363 B.R. 643, 645 (Bankr. D. Mass. 2007). In *Nosek* the mortgage creditor's accounting system did not take into account the filing of a bankruptcy case. In that case, the confirmed plan stated that arrearages would be paid by the trustee from plan payments and the debtor would continue making regular monthly mortgage payments directly to creditor. The problem arose when the creditor's accounting system would not differentiate between pre-petition and post-petition payments. The *Nosek* Court noted that,

> "The purpose of a Chapter 13 plan is to allow a debtor to pay arrears during the pendency of the plan while continuing to make payments at the contract rate. Payments made during the pendency of the Chapter 13 plan should have been applied by [the lender] to the current payments [then] due and owing with the arrearage amounts [received from the Chapter 13 Trustee] to be applied to the back payments. [The lender] cannot use its accounting procedures to contravene the terms of a confirmed Chapter 13 plan and the Bankruptcy Code."

Nosek at 645(*quoting In re Rathe*, 114 B.R. 253, 257 (Bankr. D. Idaho 1990))[Brackets in original]. Creditor argued that this would be an administrative burden stating, "[i]f Nosek is correct that Ameriquest was required to apply payments in a manner different from the underlying contracts, Ameriquest (and the other mortgage servicers) would be forced to constantly monitor each debtor's bankruptcy case, readjust their accounting methodologies, and continually recalculate how payments should be applied." *Id.* The Court's response was,

> That is exactly the point; Ameriquest must adjust its accounting practices because of Nosek's bankruptcy. The Bankruptcy Code is not a cafeteria; lenders do not decide which of its provisions apply to them. Once a debtor files for Chapter 13, the Bankruptcy Code, and only the Bankruptcy Code, dictates the protections (such as the preemption of state law remedies) afforded to the lender and the obligations (such as the separate accounting for pre-and-post petition payments) required of them.

Nosek at 649.

The second concern expressed by Debtors is a creditor charging undisclosed fees and fees specifically charged only to chapter 13 debtors, including monthly property inspection fees, monthly property preservation fees, broker price opinion fees, proof of claim preparation fees, and fees for the review of chapter 13 plans just to name a few. These fees, which seem to proliferate in number in recent years, may or not be proper pursuant to the terms of a particular debtor's note and mortgage.

In the class action case, *Harris v. First Union Mortg. Corp. (In re Harris)*, 2002 Bankr. LEXIS 771 (Bankr. S.D. Ala. 2002), the creditor had a policy (and instructed its outside counsel) not to disclose a charge termed "proof of claim preparation fee." These pre-confirmation fees were not included in the creditor's proof of claim for arrearages and were either collected or posted to the accounts after the debtors filed bankruptcy. The court stated,

> A bankruptcy case's purpose is to allow a debtor to get out of financial trouble. At discharge, a debtor ought to be able to expect he or she has brought his or her secured debts current and wiped out all unsecured debts not paid through a plan. Undisclosed fees prevent a debtor from paying the fees in his or her plan-an option that should not be lost simply because a creditor chooses to not list the fee and expects to collect it later….
>
> [P]ostconfirmation fees are not part of the creditor's secured claim in a chapter 13 bankruptcy case, but preconfirmation fees are. The treatment of all preconfirmation fees, therefore, must be consistent with this premise. Since the fees are to be treated as part of First Union's secured claim, two things must happen. The proof of claim fee must be disclosed so that the debtor knows the fee is part of the secured claim. Second, the fee should be included in the arrearage claim portion of the debt so that debtor can pay the fee through his or her plan as allowed by 11 U.S.C. § 1322(b)(5).
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> [Section] 506(b) clearly includes attorneys fees as part of a creditor's secured claim as made clear in *Rake v. Wade, supra*, and *Telfair, supra*. If the fee is not listed, the debtor has no way to know it exists. If the debtor does not know it exists, it cannot be a part of the secured claim and cannot be collected after discharge….

Id.

While these two cases demonstrate Debtors' concerns, they also demonstrate the relief available to debtors who believe they have not been treated according to the terms of a confirmed plan and the note and mortgage. Both *Nosek* and *Harris* were adversary proceedings. There is nothing that prevents Debtors from bringing an action when a creditor fails to properly account for pre and post-petition payments, or if a debtor believes improper, unreasonable or undisclosed fees have been charged. Further, a debtor may file a motion for determination of the status of the secured debt and seek a determination that the loan is current.

The meaning, intent, and purpose of the third provision is less than clear. The purpose may or may not be an attempt to establish grounds for a § 524(i) cause of action. The Court can only speculate. The concept of reinstating a mortgage or being "contractually current" is misleading. The goal is to cure the default. § 1322(b)(3). This is accomplished only if plan payments are made and post-confirmation direct payments

are made on a timely basis. Since the burden of proof for confirmation is on the Debtors the plan cannot be confirmed with this provision.

IV. Confirmation of the plan shall impose a duty on the holder(s) and/or servicer(s) of such claims, if the loan account is an adjustable rate mortgage, to notify the debtor(s) and the attorney for the debtor(s) of any interest rate change and the effective date of that change.

V. Confirmation of the plan shall impose a duty on the holder(s) and/or servicer(s) of such claims, if the loan account includes an escrow account, to notify the debtor(s) and the attorney for the debtor(s) of any escrow amount change, the reason for the escrow amount change, and the effective date of that change.

The Court addresses these provisions together as they deal with notice and the analysis is the same. The Court sympathizes with Debtors and notes that these provisions might help to alleviate some of the problems debtors encounter following the chapter 13 case. However, quite simply, the Court views these provisions as modifying the rights of the mortgagees in violation of $1322(b)(2). As stated above, the only exception to the rule against alteration of a note and mortgage secured by a debtor's principal residence is for the curing of an arrearage and maintenance of payments. These two provisions add notice requirements that are inconsistent with the original note and mortgage.

Debtors argue that the notice provisions within their notes and mortgages are not "rights of holders of secured claims" within the scope of § 1322(b)(2). Debtors cite *Nobelman v. American Sav. Bank*, 508 U.S. 324 (U.S. 1993) and *In re Collins*, 2007 Bankr. LEXIS 2487, 2007 WL 2116416(Bankr. E.D. Tenn. 2007) for this proposition. *Nobelman* states,

> The term "rights" is nowhere defined in the Bankruptcy Code. In the absence of a controlling federal rule, we generally assume that Congress has "left the determination of property rights in the assets of a bankrupt's estate to state law," since such "property interests are created and defined by state law." Moreover, we have specifically recognized that "the justifications for application of state law are not limited to ownership interests," but "apply with equal force to security interests, including the interest of a mortgagee." The bank's "rights," therefore, are reflected in the relevant mortgage instruments, which are enforceable under [state] law. They include the right to repayment of the principal in monthly

> installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure. These are the rights that were "bargained for by the mortgagor and the mortgagee," and are rights protected from modification by § 1322(b)(2).

Nobelman, Supra (internal citations omitted). Debtors' argument is that the *Nobelman* list is exhaustive and that noticing provisions in a mortgage are not protected by § 1322(b)(2). The Court is not persuaded by this argument. The use of the phrases "reflected in the relevant mortgage instruments" and "[t]hey include" in the *Nobelman* decision leads this Court to the conclusion that *Nobleman* does not create an exhaustive list of the provisions that cannot be modified.

While some mortgage provisions, such as those setting the interest rate, may be of greater economic concern to the parties, notice provisions relate to the mortgagee's administration of a loan and often serve as a predicate to enforcement rights. As stated in *Collins, Supra,* "any attempt to alter payment amounts, interest rates, *or other specific terms* set forth by the loan documents is an improper modification of rights, expressly prohibited by § 1322(b)(2) (emphasis added)." Notice provisions are specific terms of the notes and mortgages at issue and are among "the rights that were bargained for by the mortgagor and the mortgagee, . . . rights protected from modification by § 1322(b)(2)." *Nobleman*.

Mortgagees must also comply with the notice requirements of the Real Estate Settlement Procedures Act ("RESPA"). *12 U.S.C. 2601 et. seq*. Some weight must be given to the requirements Congress developed to effectuate notice in these types of secured transactions.[6]

[6] The mortgage and note notice provisions in case Nos. 07-05937 and 08-00073 are identical, stating, Note: "Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above

The provisions add the debtor's attorney as a person to be served with notice. Aside from the modification issue, this is also an allocation of burden issue. The debtor may certainly forward a copy of the notice to the attorney on receipt. A plan with these provisions cannot be confirmed.

Conclusion

Confirmation is denied. Debtors may file an amended plan consistent with this order within ten (10) days.

AND IT IS SO ORDERED.
Columbia, South Carolina
April 10, 2008

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6 (cont.)
or at a different address if I give the Note Holder a notice of my different address. Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above [property address] or at a different address if I am given a notice of that different address."

Mortgage: "Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall he given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph."